



7020-02

INTERNATIONAL TRADE COMMISSION

Investigation No. 337-TA-721

CERTAIN PORTABLE ELECTRONIC DEVICES AND RELATED SOFTWARE

DETERMINATION TO REVIEW IN PART A FINAL INITIAL DETERMINATION; SCHEDULE FOR FILING WRITTEN SUBMISSIONS

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) on October 17, 2011, finding no violation of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, in this investigation.

FOR FURTHER INFORMATION CONTACT: Amanda S. Pitcher, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2737. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission’s electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 17, 2010, based on a complaint filed by HTC Corporation (“HTC”) of Taiwan. 75 *Fed. Reg.* 34,484-85 (June 17, 2010). The complaint alleged violations of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, and sale within the United States after importation of certain portable electronic devices and related software by reason of infringement of various claims of United States Patent Nos. 6,999,800 (“the ’800 patent”); 5,541,988 (“the ’988 patent”); 6,320,957 (“the ’957 patent”); 7,716,505 (“the ’505 patent”); and 6,058,183 (“the ’183 patent”) (subsequently terminated from the investigation). The complaint named Apple Inc. as the Respondent.

October 17, 2011, the ALJ issued his final ID, finding no violation of section 337 by the respondent. Specifically, the ALJ found that the Commission has subject matter jurisdiction and that Apple did not contest that the Commission has *in rem* and *in personam* jurisdiction. The ALJ also found that there was an importation into the United States, sale for importation, or sale within the United States after importation of the accused portable electronic devices and related software. Regarding infringement, the ALJ found that Apple does not infringe claims 1-3 and 8-10 of the 800 patent, claims 1 and 10 of the ’988 patent, claims 8-9 of the ’957 patent and claims 1-2 of the ’505 patent. With respect to invalidity, the ALJ found that the asserted claims are not invalid. Finally, the ALJ concluded that an industry exists within the United States that practices the ’988 and ’957 patents, but not the ’800 and ’505 patents as required by 19 U.S.C. § 1337(a)(2).

On October 31, 2011 HTC filed a petition for review of the ID, which also included a contingent petition for review. Also on October 31, 2011, Apple filed a contingent petition for

review. On November 8, 2011, the parties filed responses to the petition and contingent petitions for review.

Having examined the record of this investigation, including the ALJ's final ID, the petitions for review, and the responses thereto, the Commission has determined to review the final ID in part. Specifically, the Commission has determined to review the ALJ's findings with respect to the '800 patent. The Commission also determined to review the ALJ's construction and finding that the accused portable electronic devices and related software do not meet the "manually operable selector" limitation of independent claim 1 of the '988 patent and independent claim 8 of the '957. Having reviewed this limitation, the Commission declines to take position on it. The Commission has determined not to review any other issues in the ID. The investigation is therefore terminated with respect to the '500, '988 and '957 patents.

The parties are requested to brief their positions on the issues under review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission is particularly interested in a response to the following questions:

1. In the Accused iPhones, is the applications processor power management unit (AP PMU) a part of the personal digital assistant (PDA), the mobile phone system, or both?
2. In the Accused iPhones, when the VDD_FAULT_LOWER threshold is met, irrespective of whether the SOC1 threshold is met, does the PDA, the mobile phone system, or both, switch between modes? In the Accused iPhones, when the SOC1

threshold is met, irrespective of whether the VDD_FAULT_LOWER threshold is met, does the PDA, the mobile phone system, or both, switch between modes?

3. Do the claims, specification, or prosecution history require that only one of the systems (*i.e.*, either the mobile phone system or PDA) power off when each of the thresholds is met?

4. Are there separate thresholds in HTC's domestic industry products that result in the mobile phone system turning off separately from the PDA? If the mobile phone and PDA systems turn off simultaneously, is there record evidence proving that the thresholds are separately set to the same limits?

5. Is claim 1 of the '800 patent anticipated by the Qualcomm pdQ device? Please explain where each element is present in the pdQ device.

6. Do the Accused iPhones meet the "switching the mobile phone system from standby mode to sleep mode when the mobile

phone system has been idle for a first period of time” limitation of claim 1 of the ’800 patent?¹

7. Do the HTC domestic industry products meet the “switching the mobile phone system from standby mode to sleep mode when the mobile phone system has been idle for a first period of time” limitation of claim 1 of the ’800 patent?

8. Do the Accused iPhones meet the “switching the PDA system from normal mode to sleep mode when the PDA system has been idle for a second period of time” limitation of claim 1 of the ’800 patent?

¹ Questions 6 and 7 pertain to issues argued by the parties but not addressed in the ID. The Commission’s rules of practice and procedure provide that the initial determination of the ALJ shall include “. . . conclusions and the reasons or bases therefor necessary for the disposition of all material issues of fact, law, or discretion presented in the record” 19 C.F.R. § 210.42(d). The Commission generally anticipates that the ALJs will adjudicate all issues presented in the record.

9. Although the Commission has determined to review the '800 patent in its entirety, can the parties respond to Apple's argument that, because HTC did not petition for review of the limitations of claim 1 of the '800 patent on which the ALJ made no findings concerning infringement, "HTC has therefore waived any argument on review that these claim limitations are present in the accused iPhones?" Respondent Apple Inc.'s Response to HTC's Petition for Review of Initial Determination at 3. In your response, please reference any relevant Section 337 or Federal Circuit precedent.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent(s) being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation. If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 *Fed. Reg.* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding. Complainant and OUII are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the date that the '800 patent expires and the HTSUS numbers under which the accused products are imported. The written submissions and proposed

remedial orders must be filed no later than close of business on Friday, December 30, 2011.

Reply submissions must be filed no later than the close of business on Friday, January 6, 2012.

No further submissions on these issues will be permitted unless otherwise ordered by the Commission. The page limit for the parties' initial submissions on the questions posed by the Commission is 50 pages. The parties reply submissions, if any, are limited to 25 pages.

Persons filing written submissions must file on or before the deadlines stated above and by noon the following business day submit 8 true copies thereof with the Office of the Secretary. Any person desiring to submit a document to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 C.F.R. § 210.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All non-confidential written submissions will be available for public inspection on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.42-46 and 210.50 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42-46 and 210.50).

By order of the Commission.

James R. Holbein
Secretary to the Commission

Issued: December 16, 2011

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